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JABATAN AGAMA ISLAM WILAYAH PERSEKUTUAN & ORS v. BERJAYA BOOKS SDN BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
MAH WENG KWAI JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-01-143-04-2013]
30 DECEMBER 2014

C

ADMINISTRATIVE LAW: *Judicial review – Jurisdiction – Third respondent charged under s. 13 Syariah Criminal Offences (Federal Territories) Act 1997 – Offence of disseminating and distributing books deemed contrary to Islamic law – Seizure of books during raid – Respondents' application for judicial review and certiorari orders to quash decision and actions of appellants allowed – Appeal against – Whether High Court had jurisdiction to hear and determine judicial review –*

D

Whether impugned actions of first appellant dealt with Syariah law and came within jurisdiction of Syariah courts – Whether appellants' actions tainted with mala fides – Whether actions of first appellant breached fundamental and constitutional rights of respondents – Whether pith and substance approach was proper approach in adjudicating matter – Wednesbury principle – Whether court

E

obliged to provide relief when fundamental guarantee provisions breached – Whether High Court constitutionally duty bound and seized with jurisdiction – Federal Constitution, art. 7

CONSTITUTIONAL LAW: *Federal and state law – Conflict – Matters of Islamic law – Third respondent charged under s. 13 Syariah Criminal Offences (Federal*

F

Territories) Act 1997 – Offence of disseminating and distributing books deemed contrary to Islamic Law – Whether offence against precepts of Islam which specifically covers Muslims only a criminal law envisaged under the Constitution – Whether any law applied wrongfully by Federal or any State Government or its agencies must be corrected through judicial review process – Whether court obliged

G

to provide relief when fundamental guarantee provisions breached

The first appellant ('Jawi'), a department in charge of Islamic affairs in the Federal Territory, conducted a search at the Borders Bookstore ('Borders') owned by the first respondent on 23 May 2012. The first appellant seized several books by author Irsyad Manji, entitled "Allah, Liberty and Love"

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and "Allah, Kebebasan dan Cinta" ('the books'). On 29 May 2012, a Prohibition Order against the publication and sale of the books was issued by the second appellant, the Minister of Home Affairs. The second respondent, a non-Muslim working as the General Manager at the Borders, and the third respondent, a Muslim working as the Store Manager, attended

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the office of the first appellant for the purpose of being examined and investigated further by the first appellant under the provisions of s. 58 of the Syariah Criminal Procedure (Federal Territories) Act 1997. The third respondent was arrested by the first appellant on 30 May 2012 and was

charged under s. 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('the SCO Act') for the offence of disseminating and distributing by way of selling the books deemed contrary to Hukum Syarak (Islamic law). On 18 June 2012, the respondents filed an application for leave for judicial review. Notwithstanding the pending hearing of the leave application, the first appellant charged the third respondent under s. 13 of the SCO Act at the Syariah Court on 19 June 2012. On 25 June 2012, leave was granted by the High Court to the respondents. On 11 March 2013, the High Court allowed the respondents' application for *inter alia, certiorari* orders to quash the decision and actions of the appellants. Dissatisfied, the appellants filed their notice of appeal to the Court of Appeal on the main grounds, *inter alia,* that the High Court had no jurisdiction to hear and determine the judicial review and had erred in law and in fact in allowing the judicial review application. The appellants argued, *inter alia*, that (i) the impugned actions of the first appellant dealt with Syariah law and therefore came within the jurisdiction of the Syariah Court; (ii) that there was no requirement for a Prohibition Order before a person can be charged for an offence under s. 13 of the SCO Act; and (iii) there was no *mala fides* on the part of the first appellant when it conducted the search and seizure of the books. The respondents, however, submitted that the appellants had failed to consider the "pith and substance" approach which was that any alleged offence against the precepts of Islamic law was not a criminal offence as was upheld in *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, Intervener) and Other Applications.* Further, on the issue of jurisdiction, the respondents invoked the principle of *res judicata* and submitted that the appellants should be estopped from revisiting the issue as the learned judge had already determined that the High Court had the jurisdiction to hear the case when leave to file the judicial review application was allowed and that the appellants did not file a notice of appeal against the said order. The respondents argued that they were not challenging the validity of s. 13 of the SCO Act but were maintaining that the State could not enact laws on matters which came within the purview of the Federal Government.

Held (dismissing appeal)
Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) The first appellant by its actions was enforcing Syariah law against the respondents. While the personal law of the third respondent was Syariah law, the personal law of the second respondent was not Syariah law as he was a non-Muslim. Thus, the second respondent could not be subjected to and/or be the subject of enforcement actions by the first appellant under the Syariah Criminal Procedure (Federal Territories) Act 1997. There was no "personal" law of the first respondent as it was a creature of statute and did not profess any religion. The court recognises that there can be two jurisdictions on the same subject matter existing side by side, namely, the secular law of the Federation and

A Syariah law. The power to punish transgressors of the precepts of Islam such as an offence under s. 13 of the SCO Act applies only to persons professing the religion of Islam. However, while it was not disputed that the SCO Act is a law for Muslims, it could not be disputed that the Act does not take away the jurisdiction of the civil court to interpret it. B (para 22)

(2) It is trite that in matters relating to fundamental and constitutional rights, the High Court exercises a supervisory role. It is the duty of the court to interpret the civil law and Syariah law harmoniously. In the present case, at the time of the search and seizure by the first appellant, C there was no Prohibition Order issued by the second appellant. Although s. 13 of the SCO Act does not require a fatwa to be issued first before a person can be charged for an offence under the said section, but in view of the fact that the impugned books had been sold internationally and locally before the raid by the first appellant and there being no D Prohibition Order issued by the second appellant to alert the public, it would be a travesty of justice to find that in the said circumstances the spirit and intent of s. 13 of the SCO Act had been fulfilled so as to justify the search and seizure of the books at the bookstore. (para 27)

(3) The court could not agree with the appellant's argument that the E complaint by the respondents against the conduct of the first appellant was essentially one of wrongful search and seizure and arrest and that the cause of action should therefore be in tort for a claim of damages by writ action and not by way of a judicial review. The actions of the first appellant had gone beyond mere tortious liability and had instead F breached the fundamental and constitutional rights of the respondents. (para 27)

(4) The proper approach to be taken in adjudicating the matter would be the pith and substance approach. A holistic approach must be taken in the circumstances and the court should not consider just the subject based G approach versus the remedy based approach argument. The pith and substance approach is the correct approach as it will be wide enough to include the consideration of both the subject matter of the case and the reliefs sought. (para 27)

(5) Without any fatwa, public notification or Prohibition Order in place to H alert the public on the "unlawful" status of the books, it offended the sense of fair play and justice to accuse the respondents for being in breach of s. 13 SCO Act. It is a basic criminal jurisprudence that one cannot be charged with an offence unless there is a rule or law prohibiting the conduct complained of. The appellants had acted in I excess of their powers and their conduct was unreasonable and unlawful in the circumstances within what is commonly understood as the limits of the *Wednesbury* principle. As the offence herein was an offence against

the precepts of Islam and there was no similar offence in the Federal law and the impugned offence specifically covers Muslims only, clearly it could not be argued that it is a 'criminal law' as envisaged by the Constitution. (para 30)

(6) The hearing in the High Court was not for a judicial review of a criminal case. No doubt the judicial review process was not suitable for criminal cases, but what was evident in the judicial review proceedings was that the respondents were challenging the action of the first appellant as being in breach of art. 7 of the Federal Constitution which is a provision on fundamental liberties and was not a challenge on the provisions of s. 13 of the SCO Act. (para 30)

(7) In so far as the third respondent was concerned, the appellants' actions were unreasonable and irrational and tainted with *mala fides* within the meaning of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia*; refd. There was an absence of care, caution and a proper sense of responsibility as the officers of the first appellant well knew that the third respondent was subject to the directions of the second respondent. Since the first and second respondents could not be subjected to s. 13 of the SCO Act, to take action against the third respondent for an infringement of the said s. 13 in the same transaction just because she is a Muslim would run counter to the principle of fairness and justice. The second respondent had successfully shown the actions of the first appellant to be illegal and irrational. It was an abuse and an unreasonable exercise of discretionary power, unconstitutional and procedurally improper. (para 31)

(8) Malaysia has subscribed to the doctrine of constitutional supremacy and all judges have taken the oath to preserve, protect and defend the Constitution. Any law whether it is Federal or State law which is in breach of the Federal Constitution must be struck down when challenged and the Federal or any State Government and/or its agencies which apply the law wrongfully must be corrected through the judicial review process. In consequence and in addition to the *Wednesbury* principle which relates to administrative action, the court is obliged to provide relief when the fundamental guarantee provisions are breached. Thus, the High Court was constitutionally duty bound and seized with jurisdiction to hear and determine the issues and to grant the reliefs prayed for. (para 31)

Bahasa Malaysia *Translation Of Headnote*

Perayu pertama ('Jawi'), sebuah jabatan yang bertanggungjawab bagi hal ehwal Islam di Wilayah Persekutuan, menjalankan penggeledahan di Kedai Buku Borders ('Borders') yang dimiliki responden pertama pada 23 Mei 2012. Perayu pertama merampas beberapa buku oleh penulis Irsyad Manji, yang bertajuk "Allah, Liberty and Love" dan "Allah, Kebebasan dan Cinta".

Pada 29 Mei 2012, suatu Perintah Larangan terhadap penerbitan dan penjualan buku-buku telah dikeluarkan oleh perayu kedua. Responden kedua, seorang yang bukan beragama Islam yang bekerja sebagai Pengurus Besar di Borders, dan responden ketiga, seorang yang beragama Islam dan bekerja sebagai Pengurus Kedai, menghadirkan diri di pejabat perayu pertama bagi tujuan diperiksa dan disiasat oleh perayu pertama di bawah peruntukan s. 58 Akta Tatacara Jenayah (Wilayah-Wilayah Persekutuan) 1997. Responden ketiga telah ditahan oleh perayu pertama pada 30 Mei 2012 dan telah dituduh di bawah s. 13 Akta Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ('Akta KJS') untuk kesalahan menyebarkan dan mengagihkan melalui penjualan buku-buku yang dianggap bertentangan dengan Hukum Syarak (Undang-Undang Islam). Pada 18 Jun 2012, responden memfailkan permohonan untuk kebenaran semakan kehakiman. Sementara menunggu perbicaraan permohonan kebenaran, perayu pertama telah mendakwa responden ketiga di bawah s. 13 Akta KJS di Mahkamah Syariah pada 19 Jun 2012. Pada 25 Jun, kebenaran telah diberikan oleh Mahkamah Tinggi kepada responden-responden. Pada 11 Mac 2013, Mahkamah Tinggi telah membenarkan permohonan responden untuk antara lain perintah *certiorari* untuk membatalkan keputusan dan tindakan perayu. Tidak berpuashati, perayu-perayu telah memfailkan notis rayuan kepada Mahkamah Rayuan atas alasan-alasan utama, antara lain, bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar dan memutuskan semakan kehakiman dan telah terkhilaf dari segi undang-undang dan fakta apabila membenarkan permohonan semakan kehakiman. Perayu-perayu menghujahkan, antara lain, (i) tindakan-tindakan yang dipersoalkan perayu adalah berkaitan dengan undang-undang Syariah dan oleh itu terangkum dalam bidang kuasa Mahkamah Syariah; (ii) tiada keperluan untuk Perintah Larangan sebelum seseorang boleh didakwa di bawah kesalahan s. 13 Akta KJS; dan (iii) tiada *mala fide* daripada pihak perayu pertama apabila ia mengendalikan penggeledahan dan penyitaan buku. Responden-responden, walau bagaimanapun, menghujahkan bahawa perayu-perayu telah gagal mempertimbangkan pendekatan isi dan kandungan di mana apa-apa kesalahan yang didakwa adalah menentang panduan Undang-Undang Islam bukan kesalahan jenayah seperti yang diputuskan dalam *Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, Intervener) and Other Applications.* Selanjutnya, atas isu bidang kuasa, responden-responden menggunakan prinsip *res judicata* dan menghujahkan bahawa perayu-perayu diestop daripada membuka semula isu itu kerana hakim bicara telah memutuskan bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar kes apabila kebenaran untuk memfailkan permohonan semakan kehakiman dibenarkan dan perayu-perayu tidak memfailkan notis rayuan terhadap perintah tersebut. Responden-responden menghujahkan bahawa mereka bukan mencabar kesahihan s. 13 Akta KJS tetapi menegaskan bahawa Negeri tidak boleh menggubal undang-undang yang penting berkenaan perkara-perkara yang berada di dalam skop Kerajaan Persekutuan.

Diputuskan (menolak rayuan)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Perayu pertama melalui tindakannya telah menguatkuasakan Undang-Undang Syariah terhadap responden-responden. Undang-undang peribadi bagi responden ketiga adalah Undang-Undang Syariah, manakala undang-undang peribadi bagi responden kedua bukan Undang-Undang Syariah kerana dia bukan seorang yang beragama Islam. Oleh itu, responden kedua tidak tertakluk atau menjadi subjek kepada tindakan penguatkuasaan perayu pertama di bawah Akta Tatacara Jenayah (Wilayah-Wilayah Persekutuan) 1997. Tiada undang-undang "peribadi" bagi pihak responden pertama kerana ia adalah ciptaan statut dan tidak menganuti mana-mana agama. Mahkamah mengiktiraf bahawa terdapat dua bidang kuasa berkenaan subjek yang sama yang wujud beriringan, iaitu, undang-undang sekular Persekutuan dan undang-undang Syariah. Kuasa untuk menghukum penceroboh panduan Islam seperti kesalahan di bawah s. 13 Akta KJS diguna pakai hanya kepada mereka yang menganuti agama Islam. Walaupun tidak dipertikaikan bahawa Akta KJS adalah undang-undang untuk orang Islam, ia juga tidak boleh dipertikaikan bahawa Akta tidak menghapuskan bidang kuasa mahkamah sivil untuk mentafsirkannya.

(2) Adalah matan bahawa dalam perkara berhubungan dengan hak-hak asasi dan perlembagaan, Mahkamah Tinggi melaksanakan satu fungsi penyeliaan. Adalah tanggungjawab mahkamah untuk mentafsirkan undang-undang sivil dan undang-undang Syariah secara berharmoni. Dalam kes ini, pada masa perayu melaksanakan penggeledahan dan penyitaan, tiada Perintah Larangan dikeluarkan oleh perayu kedua. Walaupun s. 13 Akta KJS tidak memerlukan fatwa dikeluarkan sebelum seseorang boleh didakwa untuk kesalahan di bawah seksyen tersebut, tetapi memandangkan fakta bahawa buku-buku yang telah dipersoalkan itu telah dijual di peringkat antarabangsa dan tempatan sebelum serbuan oleh perayu pertama dan dengan tiada Perintah Larangan dikeluarkan oleh perayu kedua sebagai amaran kepada pihak awam, ia merupakan satu persendaan terhadap keadilan untuk mendapati bahawa dalam keadaan tersebut semangat dan maksud s. 13 Akta KJS telah dipenuhi untuk menjustifikasikan penggeledahan dan penyitaan buku-buku di kedai buku.

(3) Mahkamah tidak boleh bersetuju dengan hujahan perayu bahawa aduan oleh responden terhadap kelakuan perayu pertama adalah penggeledahan dan penyitaan serta tahanan salah dan bahawa kausa tindakan seharusnya secara tort bagi tuntutan ganti rugi melalui tindakan writ dan bukan melalui semakan kehakiman. Tindakan-tindakan perayu pertama telah melampaui liabiliti tort dan telah melanggar hak-hak asasi dan perlembagaan responden-responden.

(4) Pendekatan yang betul yang harus diambil dalam menghakimi perkara ini adalah pendekatan isi dan kandungan. Pendekatan holistik harus diambil dalam keadaan tersebut dan mahkamah tidak sepatutnya mempertimbangkan hanya berdasarkan pendekatan subjek berlawanan dengan pendekatan remedi berasaskan hujahan. Pendekatan isi dan kandungan adalah pendekatan yang betul kerana ia adalah cukup luas untuk memasukkan pertimbangan kedua-dua subjek perkara kes dan relif-relif yang dituntut.

(5) Tanpa apa-apa fatwa, pemberitahuan atau Perintah Larangan awam bagi memaklumkan kepada pihak awam berkenaan status buku-buku itu yang menyalahi undang-undang, ia telah menyalahi maksud adil dan keadilan untuk menuduh responden-responden melanggar s. 13 Akta KJS. Ia adalah jurisprudens jenayah asas bahawa seseorang tidak boleh didakwa dengan kesalahan melainkan terdapat satu kaedah atau undang-undang yang melarang kelakuan yang telah diadukan. Perayu-perayu telah bertindak melampaui kuasa-kuasanya dan kelakuan mereka tidak munasabah dan menyalahi undang-undang dalam keadaan yang secara am difahamkan sebagai had-had prinsip *Wednesbury*. Oleh kerana kesalahan di sini adalah kesalahan menentang panduan Islam dan tiada kesalahan yang sama dalam undang-undang persekutuan dan kesalahan yang dipersoalkan itu hanya merangkumi orang Islam khususnya, dengan jelasnya ia tidak boleh dihujahkan sebagai 'undang-undang jenayah' seperti yang dibayangkan oleh Perlembagaan.

(6) Perbicaraan Mahkamah Tinggi bukan semakan kehakiman untuk kes jenayah. Tidak diragukan bahawa proses semakan kehakiman tidak bersesuaian untuk kes-kes jenayah, tetapi apa yang nyata dalam prosiding semakan kehakiman adalah responden-responden membantah tindakan perayu pertama sebagai melanggar per. 7 Perlembagaan Persekutuan iaitu peruntukan atas kebebasan asasi dan bukan bantahan peruntukan s. 13 Akta KJS.

(7) Berkenaan responden ketiga, tindakan perayu-perayu adalah tidak munasabah dan tidak waras dan dicemari oleh *mala fide* dalam maksud *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia*; dirujuk. Tiada perasaan peduli, peringatan dan tanggungjawab yang wajar kerana pegawai-pegawai perayu pertama mengetahui bahawa responden ketiga tertakluk kepada arahan-arahan responden kedua. Oleh kerana responden pertama dan responden kedua tidak boleh tertakluk kepada s. 13 Akta KJS, untuk mengambil tindakan terhadap responden ketiga untuk pelanggaran s. 13 tersebut dalam transaksi yang sama hanya semata-mata sebab responden ketiga adalah seorang yang beragama Islam adalah bertentangan dengan prinsip keadilan dan kesaksamaan. Responden kedua telah berjaya menunjukkan bahawa tindakan perayu

pertama adalah menyalahi undang-undang dan tidak rasional. Ia adalah satu penyalahgunaan dan perlaksanaan kuasa budi bicara yang tidak munasabah, tidak mengikut perlembagaan dan secara prosedur tidak wajar.

(8) Malaysia mengamalkan doktrin keagungan berperlembagaan dan semua hakim-hakim telah mengangkat sumpah untuk mengekalkan, melindungi dan mempertahankan perlembagaan. Mana-mana undang-undang tidak kira sama ada ia Undang-Undang Perlembagaan atau Negeri yang melanggar Perlembagaan Persekutuan harus dibatalkan apabila dicabar dan Kerajaan Persekutuan atau Negeri dan/atau agensi-agensinya yang mengguna pakai undang-undang secara salah harus diperbetulkan melalui proses semakan kehakiman. Akibatnya dan sebagai tambahan kepada prinsip *Wednesbury* yang berhubungan dengan tindakan pentadbiran, mahkamah adalah diwajibkan menyediakan relif apabila terdapat kemungkiran peruntukan-peruntukan jaminan yang asas. Oleh itu, Mahkamah Tinggi adalah terikat secara perlembagaan dan mempunyai bidang kuasa untuk mendengar dan memutuskan isu-isu dan untuk membenarkan relif-relif yang dituntut.

Case(s) referred to:

Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners) [2008] 4 CLJ 309 FC ***(refd)***

Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805 CA ***(refd)***

Ali v. Secretary of State for the Home Department [1984] 1 All ER 1009 ***(refd)***

Arnold v. National Westminster Bank Plc [1991] 1 AC 93 ***(refd)***

Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor [2003] 4 CLJ 281 FC ***(refd)***

Caslow Kilkenny Radio Ltd v. Broadcasting Commissioner [2003] 3 IR 528 ***(refd)***

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal [2014] 4 CLJ 253 FC ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***

Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 CA ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654 HC ***(refd)***

Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 CA ***(refd)***

Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***

Nik Noorhafizi Nik Ibrahim v. PP [2014] 2 CLJ 273 CA ***(refd)***

A *Potensi Bernas Sdn Bhd v. Datu Badaruddin Datu Mustapha [2009] 8 CLJ 573 HC* ***(refd)***
R v. Secretary of State for the Environment, Ex Parte Hackney London Borough Council and Anor [1983] 3 All ER 358 ***(refd)***
Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad (As the President of PERKIM) & Ors [2012] 7 CLJ 845 CA ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC
B ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***
Sulaiman Takrib v Kerajaan Negeri Terengganu Kerajaan Malaysia (Intervener) and Other Applications [2009] 2 CLJ 54 FC ***(refd)***

C **Legislation referred to:**
Federal Constitution, arts. 4(4), 7, 121(1A), 128
Printing Presses and Publications Act 1984, s. 7
Rules of Court 2012, O. 53
Syariah Criminal Offences (Federal Territories) Act 1997, s. 13
Syariah Criminal Procedure (Federal Territories) Act 1997, s. 58

D *For the appellant - Noor Hisham Ismail (Mazlifah Ayob with him); SFC*
For the respondent - Rosli Dahlan (Bahari Yeow Tien Hong, Ang Hean Leng & Abdullah Khubayb Awaluddin with him); M/s Lee Hishammuddin Allen & Gledhill

Reported by Suhainah Wahiduddin

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JUDGMENT

Mah Weng Kwai JCA:

The Parties

F **[1]** The first appellant, Jabatan Agama Islam Wilayah Persekutuan ('JAWI'), is the department in charge of Islamic Affairs in the Federal Territory of Kuala Lumpur. The second appellant is the Minister of Home Affairs while the third appellant is the Minister in the Prime Minister's Department in charge of Islamic Affairs.

G **[2]** The first respondent, a duly incorporated company under the Companies Act 1965, is the owner of Borders Bookstore ('the bookstore'). Borders is an internationally renowned chain of bookshops. The second respondent, Stephen Fung Wye Keong, a non-Muslim, was the General Manager of Operations and Merchandising of the first respondent and was
H fully responsible for the selection of titles and stock of books and publications displayed and sold at the bookstore. The third respondent, Nik Raina binti Nik Abdul Aziz was an employee of the first respondent. She was employed as the Store Manager of the bookstore. The third respondent was junior to and answerable to the second respondent.

I **[3]** On 23 May 2012, the first appellant conducted a search at the bookstore at the Gardens, Mid Valley Mall, Jalan Syed Putra, Kuala Lumpur. Officers of the first appellant were accompanied by a group of reporters and photographers.

[4] The first appellant seized several books under two titles by an internationally known author, Irsyad Manji, entitled "Allah, Kebebasan dan Cinta" and "Allah, Liberty and Love" ('the books') after checking them at the bookstore.

[5] The first appellant then examined the second and the third respondents at the premises and issued orders compelling them to be present at the first appellant's office for further examination and investigation.

[6] On 29 May 2012, a Prohibition Order against the publication and sale of the books was issued by the second appellant. The Prohibition Order was published *vide* Gazette Notification PU(A) 162 on 14 June 2012, known as the Printing Presses and Publications (Control of Undesirable Publications) (No 3) Order 2012 under the Printing Presses and Publications Act 1984 ('the PPP Act'), banning the publication and sale of the books.

[7] The second and third respondents and another employee, Farihna binti Mohamed Fadhlullah attended the office of the first appellant on 30 May 2012 for the purpose of being examined and investigated further by the first appellant under the provisions of s. 58 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

[8] The third respondent was arrested by the first appellant on 30 May 2012 and was charged under s. 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('the SCO Act') for the offence of "disseminating and distributing by way of selling the books deemed contrary to Hukum Syarak (Islamic Law)".

[9] At the time of the search and seizure the books were not subject to any Prohibition Order issued by the second appellant.

[10] The third respondent was not in any way responsible for the selection of titles of books to be sold at the bookstore.

[11] As at 23 May 2012, there was no fatwa, declaration, announcement or circular issued by the first appellant or by any other religious authority banning the publication and sale of the books on the ground that it is in breach of Hukum Syarak. No prior notice of any objections was given by the first appellant and no search warrant was issued to the first appellant to conduct the search and seizure of the books.

The Proceedings

[12] On 18 June 2012, the respondents filed an application for leave for judicial review. Notice of the leave application and cause papers were served on the appellants.

[13] Notwithstanding the pending hearing of the leave application, the first appellant charged the third respondent under s. 13 of the SCO Act at the Syariah Court, Kuala Lumpur on 19 June 2012.

[14] On 25 June 2012, the application was heard *inter partes* and leave was granted by the learned judge to the respondents. At the hearing, the Senior Federal Counsel for the appellants had argued that the High Court did not have the jurisdiction to hear the judicial review application.

[15] However, the appellants did not file a notice of appeal against the order of the learned judge granting leave for the judicial review application to be heard.

[16] The learned judge heard the respondents' judicial review application on 11 March 2013 and on 22 March 2013, allowed the respondents' application for *inter alia*, *certiorari* orders to quash the decision and actions of the appellants.

The Order Of The High Court Of 22 March 2013

[17] After hearing the parties, the learned judge allowed the respondents' application in encl. 15. It will be useful to set out here in full the terms of the order against which the appellants are appealing:

> (a) an order of *Certiorari* to quash the actions by the officers of JAWI in raiding, searching, confiscating and seizing the published materials in the premises of the 1st Applicant and investigating the 1st Applicant's employees on 23 May 2012, and the issuance of the Attendance Order ('Perintah Hadir') dated 23 May 2012 to the 1st Applicant's employees namely, Stephen Fung Wye Keong and Nik Raina binti Nik Abdul Aziz being the 2nd Applicant and 3rd Applicant respectively ("JAWI's Actions"), and an order of *Mandamus* that JAWI produce all records and documents concerning JAWI's Actions before this Honourable Court and upon reviewing, an order that JAWI withdraw and cancel the said JAWI's Action;
>
> (b) an Order of *Certiorari* to quash the decision to arrest, the Self-Bond (Bon Diri) dated 30 May 2102 and the prosecution by JAWI against the 3rd Applicant and subsequently, an Order of Mandamus that JAWI produce all records and documents concerning the arrest, the Self-Bond and the prosecution papers against the 3rd Applicant before this Honourable Court and upon reviewing, an order that JAWI withdraw and cancel the arrest, the Self-Bond and the prosecution against the 3rd Applicant which are inconsistent with Article 7 of the Federal Constitution;
>
> (c) a declaration that any enforcement action under section 13 Syariah Criminal Offences (Federal Territories) Act 1997 ('SCOA 1997') is subject to a prior Prohibition Order under section 7 of the Printing Presses and Publications Act 1984 ('PPPA 1984');
>
> (d) a declaration that any provisions for offences involving matters relating to "newspaper, publication, publisher, printing and printing press" are not matters capable of being legislated under section 13 SCOA 1997;

(e) a declaration that the provision of section 13 SCOA 1997 to the extent it purports to prescribe matters relating to "newspaper, publication, publisher, printing and printing press" is inconsistent with section 7 of Printing Presses and Publications Act 1984;

(f) a declaration that the provision of section 13 SCOA 1997 is in excess of Article 74 and the Ninth Schedule, List II of the Federal Constitution to the extent that it purports to prescribe offences relating to "printing, publishing, producing, recording, distributing or in any other manner disseminating any book, pamphlet, documents or any form of recordings", which are not matters capable of being legislated thereunder;

(g) a declaration that the provision of section 13 SCOA 1997 as promulgated is *ultra vires* of Article 74 and Ninth Schedule, List I of the Federal Constitution to the extent that it purports to prescribe matters relating to "newspaper, publishing, publisher, printing and printing press" which are expressly reserved to be legislated by the federal law within the jurisdiction of the Civil Courts and not the Syariah Courts;

(h) a declaration that the 2nd Applicant and/or anyone who is a non-Muslim cannot be subject to and/or be the subject of enforcement actions under the Syariah Criminal Procedure (Federal Territories) Act 1997 ('Procedure Act 1997') when SCOA 1997 and the Syariah Court's jurisdiction under section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 ('Administration Act 1993') is only applicable to Muslims;

(i) a declaration that Berjaya Books Sdn Bhd ('referred to as Borders'), which is a company incorporated under the Companies Act 1965, cannot be construed as a Muslim or an Islamic body and therefore cannot be the subject of enforcement actions under the Procedure Act 1997 when SCOA 1997 and the Syariah Court's jurisdiction under the Administration Act 1993 is only applicable to Muslims; and

(j) upon the consent of the Applicants, there shall be no order as to costs.

The Appeal

[18] Being dissatisfied with the decision of the learned judge, the appellants' filed their notice of appeal on 2 April 2013 to the Court of Appeal on the main grounds *inter alia*, that:

(i) The High Court had no jurisdiction to hear and determine the judicial review; and

(ii) The learned judge had erred in law and in fact in allowing the judicial review application.

A **The Decision Of The Court Of Appeal**

[19] Upon reading the written submissions of the Senior Federal Counsel for the appellants and counsel for the respondents and upon hearing oral submissions of the parties aforesaid on 21 August 2014 and 22 August 2014, this court reserved its decision to a date to be fixed by the Registrar.

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[20] We now deliver our decision and the grounds of our decision.

[21] After a careful consideration of the written and oral submissions of the parties to this appeal and upon a careful analysis of the law and evaluation of the facts herein, we are of the unanimous view that there are no merits
C in the appeal and accordingly the appeal is hereby dismissed subject to the consequential orders as set out later in this judgment with no order as to costs.

Grounds Of Judgment

D **[22]** The appellants' case:

(i) Central to the appellants' argument was that the High Court did not have the jurisdiction to hear the judicial review application as the impugned actions of the first appellant dealt with Syariah Law and therefore came within the jurisdiction of the Syariah Court;

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(ii) The Senior Federal Counsel submitted that the learned judge should have adopted the "subject based approach" and not the "remedy based approach" when considering and determining the issue of jurisdiction, with the subject matter here being the alleged commission of an offence by the third respondent under s. 13 of the SCO Act. It was contended
F that as the enforcement of the Syariah Law was by the first appellant, thus the subject matter "belonged" to the Syariah Court;

(iii) In support of his argument, the Senior Federal Counsel cited the case of *Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 4 CLJ 253 which had recently reversed the decision of
G the Court of Appeal in *Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad (As the President of PERKIM) & Ors* [2012] 7 CLJ 845. The Federal Court in its decision, made after the decision of the learned judge in this case, held that the court in *Siti Hasnah* had to consider the subject matter of the case;

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(iv) The Senior Federal Counsel further submitted that the learned judge had ignored the subject matter approach when she did not fully consider the Federal Court case of *Sulaiman Takrib v. Kerajaan Negeri Terengganu Kerajaan Malaysia (Intervener) and Other Applications* [2009] 2 CLJ 54; [2009] 6 MLJ 354, which had decided to adopt the subject
I matter approach;

(v) The Senior Federal Counsel also cited the cases of *Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor* [2003] 4 CLJ 281 and *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 both of which seemed to decide that the correct approach to be followed is the "subject based" approach;

(vi) The appellants' case was that if there was any complaint by the respondents on the ground that the search and seizure of the books were wrongful then the respondents' cause of action would be in tort and by way of a writ action and not by way of a judicial review. And although the first and second respondents being non-Muslims were not charged in the Syariah Court, they could be called as witnesses in the case against the third respondent;

(vii) The second ground relied on by the Senior Federal Counsel was that the learned judge had erred in holding that the actions of the first appellant were unlawful and in excess of their powers. The Senior Federal Counsel submitted that the issue of "irrationality" should be dealt with by a Syariah Court as it encroached onto issues of fact and in any event the judicial review jurisprudence is not suitable for criminal cases. The Senior Federal Counsel contended that the offence under s. 13 of the SCO Act is very distinct from offences under the PPP Act and that significantly, there is no requirement for a Prohibition Order before a person can be charged for an offence under s. 13 of the SCO Act; and

(viii) The Senior Federal Counsel submitted that there was no *mala fides* on the part of the first appellant when it conducted the search and seizure of the books at the bookstore and that there was neither malicious intent nor collateral purpose envisaged on the part of the officers of the first appellant.

[23] The respondents' case:

(i) The response of the respondents' counsel to the submission by the Senior Federal Counsel that the subject based approach ought to have been followed by the learned judge was that the Senior Federal Counsel had failed to consider instead the "pith and substance" approach which was the correct and proper approach to be adopted when dealing with this case;

(ii) The "pith and substance" approach to the case according to counsel was that any alleged offence against the precepts of Islamic law is not a criminal offence as was upheld in the case of *Sulaiman Takrib* (*supra*). It was argued by counsel that as Syariah Law is a personal law it should apply to Muslims only and not to non-Muslims such as the second respondent in this instance when he was examined by officers of the first appellant under the provisions of the SCO Act;

(iii) The "pith and substance" approach would not be confined to Syariah issues and to the sections of the law but importantly to consider the breach of the constitutional rights of the respondents occasioned by the search and seizure of the books and the examination of the second respondent in particular, at the office of the first appellant. It is not just about the provisions of s. 13 of the SCO Act *per se* but rather it was about the powers of the first appellant and the conduct of its officers at the search and seizure at the bookstore and the subsequent examination of witnesses;

(iv) Counsel relied on the Federal Court case of *Latifah* (*supra*) and submitted that the Federal Court did not follow the "subject based" approach;

(v) On the issue of jurisdiction, counsel for the respondents invoked the principle of *res judicata* and submitted that the appellants should be estopped from revisiting the issue as the learned judge had already determined that the High Court had the jurisdiction to hear the case when leave to file the judicial review application was allowed and that the appellants did not file a notice of appeal against the said order. The *ex parte* application was in fact heard *inter partes* and the issue of jurisdiction had been fully ventilated before the learned judge; and

(vi) The respondents in their O. 53 Rules of Court 2012 application was not challenging the validity of s. 13 of the SCO Act or that the State has no power to enact laws on Islamic matters but were maintaining that the State cannot enact laws on matters which come within the purview of the Federal Government and that the application for declaratory reliefs was not in violation of art. 4(4) of the Federal Constitution. The respondents merely sought the reliefs under O. 53 to bind the parties only.

Findings Of The Court

[24] At the commencement of this appeal we saw it proper to remind ourselves that the case before the learned judge was a judicial review application and not an appeal against the actions and decisions of the appellants. In doing so we had in mind what Lord Roskill said in the case of *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] 1 AC 374 to wit:

> ... This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, 1174, "is not an appeal from a decision, but a review of the manner in which the decision was made".

[25] We were further mindful of what was said by the Federal Court of Ireland in *Caslow Kilkenny Radio Ltd v. Broadcasting Commissioner* [2003] 3 IR 528 that a judicial review was not concerned about the correctness of a

decision but rather with the way that decision was arrived at (see also *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417). A

[26] Thus, the focus of these grounds of judgment, in the later part of the judgment will be on the manner in which the decision was made by the appellants. B

[27] The *res judicata* and issue estoppel issue:

(i) The issue of jurisdiction was seriously challenged by the appellants in the High Court at the stage of hearing of the leave application. Notwithstanding the strong objections of the appellants, the learned judge ruled that the High Court had the jurisdiction to hear and grant the leave application. It is significant to note that the appellants did not appeal against the decision of the learned judge on the grant of leave thereby impliedly and/or expressly conceding that the High Court did have jurisdiction in the matter and that the decision of the learned judge was a final order in the circumstances; C D

(ii) It was argued by the Senior Federal Counsel that in an application for leave, the threshold applicable is a low threshold (see *Abdul Rahman Abdullah Munir & Ors v. Datuk Bandar Kuala Lumpur & Anor* [2008] 6 CLJ 805; [2008] 6 MLJ 704). We agree generally with this proposition of law but we wish to add that we take the view that while the threshold in an application for leave may be lower in terms of facts, the threshold on matters of law would be the same as in the hearing of the judicial review itself. This is because the issue of jurisdiction of the court goes to the root of the matter before the court. It is a fundamental issue and it cannot be that a question of law will be decided on a lower standard in a leave application and the same question of law will be decided on a higher standard in the full hearing of the judicial review application; E F

(iii) Examining the same objection by the Senior Federal Counsel from a different perspective, the following question may be asked and that is, can the learned judge change her mind and overrule her own decision and hold that the High Court did not have the jurisdiction to hear the judicial review application after having in the first instance granted leave on the basis that the High Court was seized with jurisdiction? The answer to the question in our view must surely be a resounding no; G H

(iv) During the hearing of the appeal, it was submitted by the Senior Federal Counsel that the doctrine of issue estoppel cannot be relied on in an application for judicial review. The Senior Federal Counsel referred to the Court of Appeal decision in *Abdul Rahman Abdullah Munir* (*supra*) in support of his proposition where Abdull Hamid Embong JCA (as he then was) speaking for the court held that the doctrine of issue estoppel had no application in the appeal. The court I

had agreed with the submission of counsel for the appellants in *Abdul Rahman*. There, Counsel had merely referred to a line in the judgment of Sir John Donaldson MR who stated that the doctrine of issue estoppel "has no place in public law and judicial review in the case of *R v. Secretary of State for the Environment, Ex Parte Hackney London Borough Council and Anor* [1983] 3 All ER 358 (see also *Ali v. Secretary of State for the Home Department* [1984] 1 All ER 1009)";

(v) While we agree issue estoppel is not absolute and there may be special circumstances (eg, change in material facts or law) which may allow a court to reopen the issue in a subsequent proceeding, (see *Arnold v. National Westminster Bank Plc* [1991] 1 AC 93), we are clearly of the view that there are no prevailing circumstances in this case to justify the reopening of the issue of jurisdiction in this appeal given that the issue had been fully canvassed before the learned judge and that the appellants had chosen not to appeal against the said decision;

(vi) We are thus of the view that the appellants cannot now raise the issue of lack of jurisdiction. They are estopped from pursuing this point further in the hearing of this appeal;

(vii) However, in the event we are wrong to hold that *res judicata* and issue estoppel do apply in the circumstances of this case and that the appellants should not be estopped from further raising the issue of jurisdiction of the High Court in this appeal, we are nonetheless, of the view that the High Court did possess the jurisdiction to adjudicate in the judicial review application; and

(viii) We say the High Court has the jurisdiction to hear the judicial review application for the following reasons:

(a) The first appellant by its actions was enforcing Syariah Law against the respondents namely, the search and seizure of the books at the bookstore; the examination of the witnesses at the office of the first appellant and the eventual prosecution of the third respondent in the Syariah Court;

(b) There is no dispute that the appellants are public authorities performing a public duty and further there is no dispute that the respondents are aggrieved parties;

(c) The application by the respondents related to purported breaches of fundamental and constitutional rights of the respondents;

(d) While the personal law of the third respondent is Syariah Law, the personal law of the second respondent is not Syariah Law as he is a non-Muslim. There is no "personal" law of the first respondent as it is a creature of statute and does not profess any religion. Only a natural person can profess a religion (see *Potensi Bernas Sdn Bhd v. Datu Badaruddin Datu Mustapha* [2009] 8 CLJ 573);

(e) The court recognises that there can be two jurisdictions on the same subject matter existing side by side namely, the secular law of the Federation and Syariah Law (see *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481);

(f) In *Sukma Darmawan* (*supra*), Gopal Sri Ram JCA (as he then was) when considering art. 121(1A) of the Federal Constitution and the SCO Act speaking on behalf of the Court of Appeal, said:

> In our view, this part of the appeal turns upon the true interpretation that art. 121(1A) is to receive. Does cl. (1A) to art. 121 mean that the ordinary courts are to have no jurisdiction over all matters, including offences under the Penal Code committed by persons professing the religion of Islam, which are also within the jurisdiction of the Syariah Court? Or, does it mean that the former are not to have jurisdiction over only those matters which are within the exclusive jurisdiction of the latter?

And after considering the history of art. 121(1A) and various authorities, the learned judge concluded at p. 497 as follows:

> Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression "jurisdiction of the Syariah Courts" refers to "the exclusive jurisdiction" of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the Act, then the Courts referred to in art. 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Syariah Court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code or other Federal criminal statute. So, if a person professing the religion of Islam commits adultery, then, he or she may be tried only in a Syariah court.

And in *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 4 CLJ 309 the Federal Court held:

> Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the syariah court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to syariah courts. In fact, it cannot be done. On the other hand, item 4(k) of List I, Federal List of the Ninth Schedule goes further to provide that:-
>
> > (k) Ascertainment of Islamic Law and other personal laws for purposes of federal law
>
> is a federal matter.

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[18] Reliance was made on the provision of art. 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on syariah courts to interpret the Constitution to the exclusion of this court.

[19] As I have said a number of times, ending with *Latifah (supra)*, that provision was inserted to avoid a situation as in *Myriam v. Ariff* [1971] 3 LNS 1; [1971] 1 MLJ 265, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That is not the case here. In fact, the Constitution provides to the contrary. Article 128(1) of the Federal Constitution provides:

> 128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction.
>
> (a) any question whether a law made by Parliament or by the provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

[20] That, in effect, is what the Majlis Agama Islam is saying that Syariah High Court should determine. That is a matter for this court to decide, not the Syariah High Court. Whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not, will be decided when we hear the petition.

(g) While it is not disputed that the SCO Act is a law for Muslims, it cannot be disputed that the Act does not take away the jurisdiction of the civil court to interpret it. In the Supreme Court decision of *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1 it was held:

> We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art 121 of the Federal Constitution made by Act A704 of 1988. The new cl 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. **But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law.** (emphasis added)

(h) It is a fallacy to think that generally a High Court exercising civil jurisdiction cannot review the prosecution of cases under the criminal law;

(i) On whether it can be argued that an offence against the precepts of Islam, where there is no similar offence in the federal law and the alleged offence specifically covers Muslims and pertain to Islam only, is a 'criminal law' as envisaged by the Constitution, it was held by the Federal Court in *Sulaiman Takrib* (*supra*) that:

> ... it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. **The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'.** That too seems to be the approach taken by the Supreme Court judgment in *Mamat bin Daud & Ors v. Government of Malaysia* [1988] 1 MLJ 119. In that case the issue was whether s. 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make. It was argued that the section was *ultra vires* the Constitution because, having regard to the pith and substance of the section, it was a law which ought to be passed NOT by Parliament but by the State Legislative Assemblies, it being a legislation on Islamic religion, according to art. 11(4) and item 1 of the List II, Ninth Schedule of the Federal Constitution. On the other hand, it was contended by the respondent that the section was valid because it was a law passed by Parliament on the basis of public order, internal security and also criminal law according to art. 11(5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.
>
> Salleh Abas LP who delivered one of the majority judgments said:
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> ...
>
> Surely, a legislation to deny a Muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is legislation upon religious doctrine. In its applicability to the religion of Islam, the impugned section must, in my view, be within the competence of State Legislative Assemblies only. See item 1 (of) List II of the Ninth Schedule to the Constitution.
>
> ...

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In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover Muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisaged by the Constitution.
(emphasis added)

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(j) It is trite that in matters relating to fundamental and constitutional rights, the High Court exercises a supervisory role. It is the duty of the court to interpret the civil law and Syariah Law harmoniously (see *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 4 CLJ 253 and *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] 4 CLJ 654);

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(k) In *Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121, the Court of Appeal held that a statute must be read harmoniously with the Federal Constitution so as to avoid any conflict between them that could render a statute being declared void. In the present case, at the time of the search and seizure by the first appellant there was no Prohibition Order issued by the second appellant. Neither was there any fatwa nor any form of public notification pronouncing on the prohibition to print, publish, produce, record, distribute or disseminate the books which is contrary to Islamic Law in Malaysia. In as much as we agree that s. 13 of the SCO Act does not require a fatwa to be issued first before a person can be charged for an offence under the said section, but in view of the fact that the impugned books had been sold internationally and locally before the raid by the first appellant and there being no Prohibition Order issued by the second appellant to alert the public, it would be a travesty of justice to find that in the said circumstances the spirit and intent of s. 13 of the SCO Act had been fulfilled so as to justify the search and seizure of the books at the bookstore;

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(l) We cannot agree with the appellants' argument that the complaint by the respondents against the conduct of the first appellant was essentially one of wrongful search and seizure and arrest and that the cause of action should therefore be in tort for a claim of damages by writ action and not by way of a judicial review. We are of this view simply because the actions of the first appellant had gone beyond mere tortious liability and had instead breached the fundamental and constitutional rights of the respondents;

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(m) In the final analysis, we are of the view that the proper approach to be taken in adjudicating the matter would be the pith and substance approach as contended by the respondents. We are of the view that a holistic approach must be taken in the circumstances and the court

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should not consider just the subject based approach versus the remedy based approach argument. We are of the view that the pith and substance approach is the correct approach as it will be wide enough to include the consideration of both the subject matter of the case and the reliefs sought. It is vital that the appellants fully understand and appreciate the provisions of s. 13 of the SCO Act before it is submitted that the subject based approach is the correct approach. For ease of consideration, s. 13(1) of the SCO Act is reproduced in full below:

> (1) Any person who:
>
> (a) prints, publishes, produces, records, distributes or in any other manner disseminates any book, pamphlet, document or any form of recording containing anything which is contrary to Islamic Law; or
>
> (b) has in his possession any such book, pamphlet, document or recording,
>
> shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

The Art. 128 Of The Federal Constitution Issue

[28] At the outset of his submission, the Senior Federal Counsel informed the court that he would not be taking the art. 128 argument on the jurisdiction of the Federal Court although he had submitted on it in his written submissions. Thus this issue will not be dealt with in these grounds.

[29] Paragraphs (f) and (g) of the order of the High Court of 22 March 2013 Issue:

(i) The Senior Federal Counsel informed the court that if the court was not with him in the appeal, counsel for the respondents had agreed to strike out paras. (f) and (g) from the Order of the High Court of 22 Mac 2013, by consent; and

(ii) Hence, in view of our decision in this appeal we will not be discussing on whether the provisions of s. 13 of the SCO Act are in excess of art. 74 and the Ninth Schedule, List II of the Federal List to the extent 'that it purports to prescribe offences relating to "printing, publishing, producing, recording, distributing or in any other manner disseminating any book, pamphlet, documents or any form of recordings", which are not matters capable of being legislated thereunder' and whether the provisions of s. 13 of the SCO Act are *ultra vires* art. 74 and the Ninth Schedule List I of the Federal List to the extent 'that it purports to prescribe matters relating to "newspaper, publishing, publisher, printing and printing press" which are expressly reserved to be legislated by the federal law to be within the jurisdiction of the Civil Courts and not the Syariah Courts'.

[30] The *Wednesbury* Principle:

(i) In so far as the second main ground of appeal by the appellants is concerned, we are of the view that the learned judge was correct in her finding that the appellants had acted in excess of their powers and that their conduct was unreasonable and unlawful in the circumstances within what is commonly understood as the limits of the *Wednesbury* Principle.

In *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223, the English Court of Appeal held:

> In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

(ii) The circumstances in the present case in which the court was entitled to investigate the actions of the appellants with a view to seeing if they had taken into account any matters that ought not to be taken into account or disregarded matters that ought to be taken into account were *inter alia*:

(a) As at 23 May 2012, the date of the search and seizure, there was no fatwa, declaration, announcement or circular issued by the first appellant or by any other religious authority banning the publication and sale of the books by the respondents or by anyone else, for being in breach of the Hukum Syarak;

(b) Also, as at 23 May 2012 there was no Prohibition Order issued under s. 7 of the PPP Act by the second respondent against the publication and sale of the books. The Prohibition Order was only issued by the second appellant on 29 May 2012 and published in the Gazette on 14 June 2012, that is, some six (6) days and twenty-two (22) days respectively after the search and seizure.

It will be useful to read s. 7 of the PPP Act in full at this juncture. Section 7 of the PPP Act provides as follows:

> 7. (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such

conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

(2) In the case of a publication originating in any country outside Malaysia, an order under subsection (1) may, if the order so provides:

(a) prohibit the importation of any or all publications whether before or after the date of the order, subject to such conditions as may be prescribed therein;

(b) in the case of a periodical publication, prohibit the importation of any past or future issue thereof;

(c) in the case of a publication which has been issued or appears or purports to have been issued from any publishing house, agency or other source specified in the order, prohibit the importation of any other publication which may at any time whether before or after the date of the order has been, or appears or purports to have been, issued from the specified publishing house, agency or other source;

(d) require the publisher thereof to make such deposits of such amount and in such manner as may be prescribed therein before any such publication may be imported.

(3) Where the Minister is satisfied that the publisher of any publication has acted in contravention of the Act or any rules or order made thereunder or any condition of the licence or permit or any law relating to sedition or defamation, he may after giving such publisher an opportunity to show cause why the deposit made under paragraph 2(d) should not be forfeited, order the deposit or part thereof to be forfeited.

(4) Whether or not an order has been made under subsection (3) the court may order the deposit or any balance thereof, if any:

(a) to be forfeited where the publisher fails to appear in court to answer any criminal charge or civil action relating to any matter in connection with such publication; or

(b) to be paid out in settlement of any judgment obtained against the publisher arising out of any proceeding in connection with such publication.

(5) Where a deposit made under paragraph 2(d) is ordered to be forfeited or utilized in settlement of any damages under subsection (3) or (4), the order of prohibition under subsection (1) shall become absolute unless the publisher makes a further deposit as may be required by the Minister.

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> (6) A local or foreign publisher shall be responsible and liable for any action in respect of any material published in his publication.

It will be noted that upon the issuance of the Prohibition Order, the first respondent withdrew all the books from the bookstore and their other outlets.

B

(c) Without any fatwa, public notification or Prohibition Order in place on 23 May 2012, to alert the public on the "unlawful" status of the books, it offends the sense of fair play and justice in our view to accuse the respondents for being in breach of s. 13 of the SCO Act. After all it is basic criminal jurisprudence that one cannot be charged with an offence unless there is a rule or law prohibiting the conduct complained of. And it will be trite to say that insofar as the Prohibition Order is concerned it could not have been gazetted to take effect retrospectively as this would be in conflict with art. 7(1) of the Federal Constitution which provides:

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D

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, ...
>
> (2) ...

(d) It was contended by the Senior Federal Counsel that there was no requirement for a fatwa to be issued before there can be a prosecution under s. 13 of the SCO Act. In other words, the offence under s. 13 is not contingent on a fatwa. The Senior Federal Counsel further submitted that the court cannot "inject a requirement to the legislation" when there is none. We agree with the submission of the Senior Federal Counsel. In fact we would go further and state that an offence under s. 13 of the SCO Act is not contingent on a fatwa or even a prohibitory order as s. 13 itself creates the offence envisaged. We, however, are of the view that since the books had been in circulation internationally and locally, it would offend the sense of justice to charge a person for an offence for acts being contrary to Islamic Law when there is no reference point for members of the public to refer to in order to know the nature of the offence, such as if there had been a fatwa, Prohibition Order or any other form of notification;

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(e) We agree that it does not mean that every time there is a purported breach and an alleged offence against the precepts of Islam, being a religious doctrine, there is a criminal offence committed as well. In the instant case, as the offence is an offence against the precepts of Islam and there is no similar offence in the federal law and the impugned offence specifically covers Muslims only, clearly it cannot be argued that it is a 'criminal law' as envisaged by the Constitution (see *Sulaiman Takrib* (*supra*));

I

(f) It must be made abundantly clear here that the hearing in the High Court was not for a judicial review of a criminal case. No doubt the judicial review process is not suitable for criminal cases, but what was evident in the judicial review proceedings was that the respondents were challenging the action of the first appellant as being in breach of art. 7 of the Federal Constitution which is a provision on fundamental liberties and was not a challenge on the provisions of s. 13 of the SCO Act;

(g) The fact that officers of the first appellant had proceeded to the bookstore with a group of photographers and reporters showed their intent to publicise the search and seizure and to "embarrass" the respondents. Their conduct was pre-planned and was not a raid spontaneously conducted on receipt of a complaint;

(h) The facts disclosed that the first appellant did not obtain a search warrant to conduct the raid. Given the time that the first appellant had in preparing for the raid by inviting the photographers and reporters, we are of the view that the first appellant would have had sufficient time to apply for and obtain a search warrant;

(i) It was contended by the appellants that if the learned judge was right to hold that the search and seizure of the books by the first appellant were in excess of their powers and therefore unlawful, this approach would cause absurd results and consequences to enforcement officers in their discharge of their duties under Syariah Law. For instance, it was argued that enforcement officers would not be able to enter a pub to arrest a Muslim for illegally drinking alcohol. However we are of the view that this argument is illusory simply because the consumption of alcohol by a Muslim is a forbidden act and an offence under Syariah Law and hence enforcement officers will be legally entitled to enter a pub to make an arrest. Contrast that scenario to the present case where the officers of the first appellant had wrongly searched and seized the books when it was not illegal to publish and/or sell them in the first instance *viz* the Prohibition Order; and

(j) It is equally important for the court to consider the fact that the English edition of the books had been published internationally and were available in the international market for some time before the search and seizure at the first respondent's bookstore. The Bahasa Malaysia version of the books was published for the Malaysian market not too long before the search and seizure.

Conclusion

[31] Having evaluated the evidence and considered the law pertaining to this case, we are of the view that the following conclusions may be stated or restated, as the case may be, namely:

A (i) The High Court exercising its supervisory civil jurisdiction is at liberty to interpret laws on fundamental liberties and to adjudicate on unconstitutional conduct by public authorities;

(ii) The civil court has the jurisdiction and power to judicially review the improper institution of criminal proceedings when the impugned B conduct is in fact not criminal in nature (see *Sulaiman Takrib* (*supra*);

(iii) The respondents are entitled to their legitimate expectation that the actions of the first appellant shall be carried out properly and lawfully;

(iv) The civil court has the jurisdiction to adjudicate on the legal status of C the third respondent as it is a matter within the province of administrative law. The case does not cease to be within the jurisdiction of the civil court just because it has an Islamic Law element in it (see *Siti Hasnah Vangarama Abdullah* (*supra*));

(v) The second respondent who is a non-Muslim cannot be subject to and/ D or be the subject of enforcement actions by the first appellant under the Syariah Criminal Procedure (Federal Territories) Act 1997 as the SCO Act applies to Muslims only, as defined in the Administration of Islamic Law (Federal Territories) Act 1993. By virtue of item 1 of the State List of the Ninth Schedule of the Constitution it is beyond doubt E that non-Muslims cannot be subjected to Islamic Law. They cannot be compelled to appear before the Syariah Court. Even if they consent, the Syariah Court has no jurisdiction over them. Jurisdiction is a matter of law, not of consent, acquiescence or convenience. Therefore, the power to punish transgressors of the precepts of Islam such as an F offence under s. 13 of the SCO Act, applies only to persons professing the religion of Islam (see *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1; [2008] 2 MLJ 147 FC);

(vi) No action whatsoever can be taken against the first respondent as it is a corporate entity and incapable of professing a religion. The action G taken against the first respondent was unlawful;

(vii) It is the duty of the court to "uphold, protect and to ensure that justice is administered in a regular and effective manner according to law";

(viii) In so far as the third respondent is concerned we are of the view that H the appellant's actions were unreasonable and irrational and tainted with *mala fides* within the meaning of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129 FC per Ong Hock Thye CJ (Malaya) that is, there was "an absence of care, caution and a proper sense of responsibility" I as the officers of the first appellant well knew that the third respondent was subject to the directions of the second respondent. Since the first respondent and second respondent cannot be subjected to s. 13 of the SCO Act, to take action against the third respondent for an

infringement of the said s. 13 in the same transaction just because she is a Muslim would run counter to the principle of fairness and justice. In a multi-racial and multi-religious country like Malaysia, it is imperative that law enforcement agencies, like the first appellant, be sensitive to the ramification of its actions lest it may lead to an unwelcomed perception that to employ any Muslims within any organisation in Malaysia would invite unwanted adverse enforcement on that organisation by the likes of the first appellant; and

(ix) In so far as the second respondent is concerned we are of the view that the second respondent has successfully shown the actions of the first appellant to be illegal and irrational. It was an abuse and unreasonable exercise of discretionary power, unconstitutional and procedurally improper.

[32] On a final note we would like to emphasise that Malaysia has subscribed to the doctrine of constitutional supremacy and all judges have taken the oath to preserve, protect and defend the Constitution. Any law whether it is Federal or State Law which is in breach of the Federal Constitution must be struck down when challenged and the Federal or any State Government and/or its agencies which apply the law wrongfully must be corrected through the judicial review process. In consequence and in addition to the *Wednesbury* principle which relates to administrative action, the court is obliged to provide relief when the fundamental guarantee provisions are breached.

[33] For reasons stated above we maintain that the High Court is constitutionally duty bound and seized with jurisdiction to hear and determine the issues and to grant the reliefs prayed for. (see *Nik Noorhafizi Nik Ibrahim v. PP* [2014] 2 CLJ 273 and *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944; [2014] 4 MLJ 157).

[34] In the result, the appeal is dismissed with no order as to costs. The order of the High Court is affirmed save that:

(i) In view of our ruling on the provisions of s. 13 of the SCO Act as stated in paras. 27 (viii) (k) and 30 (ii) (d) above, we consequentially order the deletion of paras. (c), (d), (e) and (f) and the phrase "which are inconsistent with art. 7 of the Federal Constitution" found in para. (b) of the said order; and

(ii) By consent, paras. (g) and (h) therein are deleted.